

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE LITIGATION

MDL No. 1456

THIS DOCUMENT RELATES TO:

CIVIL ACTION: 01-CV-12257-PBS

ALL ACTIONS

Judge Patti B. Saris

**CLASS PLAINTIFFS' MOTION TO STRIKE TRACK 1
DEFENDANTS' UNAUTHORIZED MEMORANDA**

Class Plaintiffs move to strike the Track One Defendants' two latest briefs: (i) Track One Defendants' Notice of Supporting Authority Regarding Statutory Adoption of AWP in 1997 filed on May 26, 2006; and (ii) Track One Defendants' Memorandum Addressing Class Plaintiffs' "Plain Meaning" Argument filed on May 30, 2006.

Both of these submissions were not authorized, violated Case Management Order No. 20 ("CMO No. 20"), and for the reasons stated below, should be stricken.

Case Management Order No. 20 ("CMO No. 20"), as modified by the Court's March 29, 2006, electronic Order, established a briefing schedule for summary judgment motions pertaining to the Track One Defendants. CMO No. 20 did not authorize Defendants to file any additional briefing, let alone supplemental and repetitive briefing after the hearing on the motion was held.

The Court has already provided the parties with a generously sufficient opportunity to brief all issues relating to Track One summary judgment proceedings, including the pivotal issue of the meaning of AWP, which all parties agree should be interpreted as a matter of law. Indeed, the Track One Defendants submitted three joint briefs pertaining to the plain meaning of AWP, and the individual Track One Defendants also commented on the issue separately in their individual briefs. Defendants also submitted the lengthy opinions of multiple, overlapping experts all of whom addressed the same issue. And Defendants also had the opportunity to present ample argument at the hearing, however unconvincing that argument turned out to be.

Not surprisingly, after four years of litigation, and after besieging the Court with reams of argument and expert reports, Defendants' latest unauthorized briefs add nothing new. They are but a regurgitation of Defendants' steadfast but illogical mantra that Congress intended AWP to mean fraudulent prices submitted by Defendants, and that this definition permitted Defendants to

engage in AWP manipulation and marketing of the spread to whatever extent Defendants desired.

Now, after finally realizing that the Court is unlikely to accept Defendants' absurd interpretation, Defendants' phalanx of lawyers retreated to their offices. Defendants faced a conundrum. Afraid of an adverse ruling and aware that they had submitted multiple briefs on the meaning of AWP, Defendants no doubt feared that the Court would not allow further submissions. The fear of an adverse ruling overcame their respect for and adherence to the rules and CMO No. 20, and Defendants thus filed the unauthorized submissions.

Defendants should not be permitted to flout the Court's case scheduling orders and local rules by adding even more paper to the already voluminous Court file. Neither CMO No. 20 nor any local rule permits a "panic" clause bestowing on the parties a right to submit unauthorized briefing when things might not be going their way. Accordingly, the Court should strike Defendants' briefs.

In the alternative, should the Court consider the submissions, Plaintiffs seek leave to file, and for the Court to consider, a response which is being "filed" today subject to Court approval.

DATED: June 1, 2006.

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CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on June 1, 2006, I caused copies of **CLASS PLAINTIFFS' MOTION TO STRIKE TRACK 1 DEFENDANTS' UNAUTHORIZED MEMORANDUM** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman